

October 22, 2018

The Honorable Jesse M. Furman
United States District Court for the Southern District of New York
40 Centre Street, Room 2202
New York, NY 10007

RE: Plaintiffs' motion regarding trial testimony from Commerce Department officials
in *State of New York, et al. v. U.S. Dep't of Commerce, et al.*, 18-CV-2921 (JMF).

Dear Judge Furman,

Three Department of Commerce officials – Earl Comstock, the Deputy Chief of Staff and Policy Director; Karen Dunn Kelley, the Acting Deputy Secretary; and Wendy Teramoto, the former Chief of Staff – were directly involved in key events leading up to Secretary Ross's decision to use the decennial census to demand information on the citizenship status of every resident in the country.¹ Defendants have indicated they do not intend to call these officials at trial. (Docket No. 380, at 5.) Subsequent to the deposition of all three witnesses, Defendants supplemented the administrative record with further probative information regarding their involvement; their deposition testimony alone therefore will not give this Court the opportunity to review the "whole record" of the agency's decision. 5 U.S.C. § 706; *see generally Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 420 (1973).

Accordingly, and as permitted by Rule 43(a) and Rule 45(c) of the Federal Rules of Civil Procedure, Plaintiffs seek leave to call Comstock, Kelley, and Teramoto as live witnesses during trial, to testify by contemporaneous video transmission.² In the alternative, Plaintiffs seek leave to conduct *de bene esse* depositions of these three witnesses. Plaintiffs will be prejudiced without the opportunity to examine these witnesses regarding this newly-available information, and the Court's adjudication of Plaintiffs' claims will benefit from updated, live testimony.

1. The Court should allow Plaintiffs to take these witnesses' live testimony during the trial by video transmission. The most effective and least burdensome way to present trial testimony from Comstock, Kelley, and Teramoto is for the Court to permit Plaintiffs to call these witnesses to testify by contemporaneous video transmission from Washington, D.C., or another location convenient to them.

¹ Because Secretary Ross's deposition (if permitted) would occur close in time to the trial, Plaintiffs do not seek video testimony or a separate *de bene esse* deposition of the Secretary. If the Supreme Court denies Defendants' request for relief from this Court's order authorizing the Secretary's deposition, Plaintiffs will use applicable portions of that deposition at trial as permitted by Fed. R. Civ. P. 32(a).

² Defendants state in the parties' joint status letter (Docket No. 380) that Ms. Teramoto is no longer employed by the Department of Commerce. Plaintiffs are in the process of confirming Ms. Teramoto's place of residence and employment, and believe she may be within the Court's subpoena power under Fed. R. Civ. P. 45(c)(1), in which case we will advise the Court and withdraw this motion as it relates to Ms. Teramoto. Plaintiffs also intend to call Dr. John Abowd as a witness but do not include him in this motion because Defendants have represented that he can be made available on a number of days during the trial.

The plain language of Rule 43 and Rule 45 permits this Court to subpoena a witness to provide simultaneous video testimony at trial from a remote location.³ Rule 43(a) provides that a witness's testimony generally "must be taken in open court," but that "[f]or good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location." Fed. R. Civ. P. 43(a). The 2013 amendments to Rule 45 contemplate that it may be used in conjunction with Rule 43 to permit trial testimony by video from courthouses close to witnesses.⁴ "When an order under Rule 43(a) authorizes testimony from a remote location, the witness can be commanded to testify from any place described in Rule 45(c)(1)." Advisory Committee Notes on the 2013 Amendment to Rule 45; *see also* 9A Wright & Miller, *Federal Practice & Procedure* § 2461 (3d ed. 2008 & Supp. 2018) (same).

At least two courts have adopted this plain-language reading of Rules 43 and 45. In *In re Actos (Pioglitazone) Products Liability Litigation*, the court issued subpoenas for the video testimony of witnesses who could not be compelled to appear in person during trial. No. 12-CV-00064, 2014 WL 107153, at *1 (W.D. La. Jan. 8, 2014). The court observed that Rules 43 and 45, when read together, "embrace and address the concept of appearance at 'trial' to include contemporaneous live transmission from another location at the location of the Court." *Id.* at *9. The court declined to limit video testimony under Rule 43 to remote witnesses who were willing to testify at trial, noting that "[n]o such limitation appears on the face of Rule 43, nor is found within the comments addressing the Rule, and this Court will not impose such an unjustified gloss on the rule by jurisprudential fiat." *Id.* Likewise, in *In re Xarelto (Rivarozaban) Products Liability*, the court issued a subpoena requiring a witness to testify at trial remotely from another state. *See* 2017 WL 2311719, at *4 (E.D. La. May 26, 2017). The court followed the plain language approach to Rule 45 described in *Actos*, noting that the subpoena did not "seek to compel [the witness] to testify at a location beyond the 100-mile geographical reach contemplated in" Rule 45(c)(1)(A). *Id.*

Allowing courts to compel remote live testimony furthers the policy goals of Rules 43 and 45. The preference for in-person testimony in Rule 43(a) reflects "[t]he importance of presenting live testimony in court," including the "ceremony of trial and the presence of the factfinder," as well as "[t]he opportunity to judge the demeanor of a witness face-to-face." Advisory Committee Notes on 1996 Amendment to Rule 43. Although in-person testimony would be preferable to simultaneous video testimony for these purposes, live video testimony is undoubtedly closer to live testimony than a pre-recorded or written deposition. *See, e.g., Lopez v. NTI, LLC*, 748 F. Supp. 2d 471, 480 (D. Md. 2010). Remote video testimony also serves the purpose of the geographic limitations of Rule 45(c) by minimizing inconvenience to the witness.

³ Plaintiffs are serving subpoenas for these witnesses' trial testimony simultaneous with the filing of this motion.

⁴ As amended, Rule 45 provides that a subpoena "must issue from the court where the action is pending," must specify the "time and place" of the required testimony, and may be served anywhere in the United States. Fed. R. Civ. P. 45(a)(1)(A)(iii), (a)(2), (b)(2). The subpoena "may command a person to attend a trial, hearing, or deposition" within 100 miles of where the person "resides, is employed, or regularly conducts business." Fed. R. Civ. P. 45(c)(1)(A). Rule 45(c) does not limit the location of either deposition or trial testimony to the court where the action is pending, and the Rule is otherwise silent on the place of the witness's attendance at trial.

Although some cases have adopted a narrower interpretation of Rules 43 and 45, these decisions depart from the plain language and policy goals of those rules. *See Roundtree v. Chase Bank USA, N.A.*, No. 13-239, 2014 WL 2480259, at *2 (W.D. Wash. June 3, 2014) (declining to compel a remote witness to testify via video where moving party “provide[d] no legal authority or compelling reason”); *Ping-Kuo Lin v. Horan Capital Mgmt., LLC*, No. 14 Civ. 5202, 2014 WL 3974585, at *1 (S.D.N.Y. Aug. 13, 2014) (following *Roundtree*). Plaintiffs respectfully suggest that *Actos* and *Xarelto* have the better reading of Rules 43 and 45 than *Roundtree* and *Ping-Kuo Lin*, and that this Court should allow simultaneous video testimony.

2. *Good cause and compelling circumstances exist to present contemporaneous video testimony at trial.* Taken together, Rule 43(a) and Rule 45(c) authorize the Court to compel trial testimony by contemporaneous video transmission where the Rule 43(a) prerequisites are otherwise met. Those requirements – “good cause in compelling circumstances and with appropriate safeguards,” Fed. R. Civ. P. 43(a) – are met in this case.

Mr. Comstock, Ms. Kelley, and Ms. Teramoto were deposed on August 30, 28, and 24, respectively. Since those depositions, Defendants have made material productions that supplement the administrative record on September 11, September 17, and October 16, including productions following motions to compel and an order compelling disclosure of previously-withheld documents. For example:

- Defendants’ September 17 production included the disclosure of Comstock’s unredacted September 8, 2017 memo to Secretary Ross (which he also provided to Teramoto). Ex. 1. This disclosure revealed for the first time that DOJ told Commerce in May 2017 that DOJ did *not* want to request inclusion of a citizenship question “given the difficulties Justice was encountering in the press at the time (the whole Comey matter).” This explanation contradicts Comstock’s deposition testimony that McHenry said DOJ was “too busy” and “they weren’t inclined to do the work, to ask for it.” Ex. 2 (Comstock Dep. Tr. 275-76).
- The September 17 production also revealed that following a call about the census on August 8, 2017, Secretary Ross emailed Comstock to express concern that “[t]hey seem d[u]g in on not [ask]ing the citizenship question and that raises the question of where is the DoJ in their analysis?” Ex. 1. Comstock responded, in part, with an apparent proposal to whitewash the administrative record because of likely judicial review: “Since this issue will go to the Supreme Court we need to be diligent in preparing the administrative record.” *Id.*
- Defendants’ October 16 production shows previously undisclosed communications between all three witnesses and Mark Neuman, including an April 2017 message from Neuman to Comstock with the subject line “One of the Supreme Court cases that informs planning for 2020 Census....,” and a link to a VRA Section 2 decision. Ex. 3. Comstock testified at his deposition that he had “no idea” whether he had discussed the citizenship question with Neuman by April 2017. Ex. 2 (Comstock Dep. Tr. 123-29).
- Defendants’ September 11 production included an October 2017 email between Kelley and Aaron Willard regarding the citizenship question, stating: “1) must come from DOJ.” Ex. 4; *see also* Docket No. 299-1 (Defs.’ privilege log for AR 1403). This email contradicts Kelley’s deposition testimony; when asked whether “Secretary Ross was hoping to get the

Department of Justice to support a request for such information,” she testified “those are details that I do not know.” Ex. 5 (Kelley Dep. Tr. 127).

- The same production included a previously-withheld May 2017 email to Comstock from David Langdon (subject line: “Counting of illegal immigrants”) explaining Langdon’s research showing “that the counting of illegal immigrants (or of the larger group of non-citizens) has a solid and fairly long legal history.” Ex. 4.

These and other post-deposition disclosures go directly to these witnesses’ role in key events in this litigation, and are highly relevant to Plaintiffs’ claims.

That Defendants produced these materials only *after* Plaintiffs took these depositions in late August is not the result of any lack of diligence on Plaintiffs’ part. Plaintiffs have vigorously sought to complete the administrative record throughout this litigation. (*E.g.*, Docket No. 193, Docket No. 201, Docket No. 220, Docket No. 237, Docket No. 293, Docket No. 299, Docket No. 313, Docket No. 343, Docket No. 349.) In any event, these materials should all have been produced to Plaintiffs by mid-August without the need for extensive motions practice. The Court ordered Defendants to complete the administrative record by July 23 (Docket No. 199), and later extended that deadline to July 26 with the admonition that “[n]o further extensions will be granted.” (Docket No. 211.) And Plaintiffs served discovery requests on July 12 (Docket No. 201), which Defendants were obligated to respond to by August 11. The records Defendants disclosed after the Comstock, Kelley, and Teramoto depositions were all responsive either to the Court’s order to complete the record or to Plaintiffs’ July 12 discovery requests, and therefore should all have been available to Plaintiffs by mid-August, *before* the depositions were taken.⁵

Nor would it be reasonable, given the expedited schedule, to suggest that Plaintiffs should have waited until later in the discovery period to depose these witnesses. Even waiting until the last week of discovery would not have sufficed to allow these depositions to be conducted on a full administrative record: Defendants are *still* producing probative documents, including just a few days ago. Ex. 6 (production of nearly six thousand pages of Commerce Department records on October 16). And in light of the compressed discovery period in this case, it would not have been feasible for *all* depositions to be delayed until October; as it is, the parties conducted sixteen fact and expert depositions between October 3 and October 12 (and an additional five depositions that were scheduled to take place in that same time period were suspended following Justice Ginsburg’s administrative stay order on October 9).

Good cause and compelling circumstances exist under Rule 43(a) where the witnesses are important to the case and where deposition testimony will not adequately account for current circumstances.⁶ *Xarelto*, 2017 WL 2311719, at *4. Comstock, Kelley, and Teramoto were

⁵ Defendants were well aware of the need to compile a complete administrative record as far back as August 2017, when Comstock emailed Secretary Ross that “[s]ince this issue will go to the Supreme Court we need to be diligent in preparing the administrative record.” Ex. 1. The failure to compile that record even after months of litigation is not because this case was expedited, but because Defendants chose to present the Court with an incomplete administrative record from the start.

⁶ The remaining consideration under Rule 43(a) – “appropriate safeguards” – is met where, as here, Defendants will have an opportunity for redirect examination of these witnesses, who can be placed under oath either by video

Secretary Ross's most senior aides working directly on the effort to demand citizenship information from every person in the country; and newly-disclosed documents produced for the first time after these witnesses' depositions – including numerous documents produced within the past week – shed new light on their involvement, or contradict their sworn deposition testimony. Relying solely on deposition testimony would prejudice Plaintiffs, reward Defendants' discovery delays and overbroad privilege assertions, and hinder the Court's ability to adjudicate this case based on a complete record. Good cause and compelling circumstances exist to compel these witnesses' appearance at trial by video under Rule 43(a).

3. *In the alternative, the Court should grant leave to take de bene esse depositions of the Department of Commerce witnesses.* If the Court determines not to permit live testimony at trial via contemporaneous video transmission, Plaintiffs seek leave to take *de bene esse* depositions of the Commerce witnesses, not to exceed four hours each and to be conducted during the week of October 29. The Second Circuit has indicated that a *de bene esse* deposition to preserve trial testimony is appropriate “when a witness is simply outside the subpoena power of the court and cannot be compelled to testify at trial.” *E.E.O.C. v. Beauty Enterprises, Inc.*, No. 01-Civ.-378, 2008 WL 3892203, at *2-3 (D. Conn. 2008) (citing *Manley v. AmBase Corp.*, 337 F.3d 237, 247-48 (2d Cir. 2003)). Courts in the Second Circuit have generally considered the moving party's showing of need to take a trial preservation deposition as well as the “prejudice each side would incur.” *Beauty Enters.*, 2008 WL 3892203, at *2; *see also United States v. Int'l Longshoremen's Ass'n*, No. CV-05-3212, 2007 WL 2782761, at *1-2 (E.D.N.Y. 2007).

As noted above, Defendants produced a number of critical documents after the Comstock, Kelley, and Teramoto depositions took place. The availability of these newly-disclosed documents establishes Plaintiffs' need to conduct *de bene esse* depositions, and Plaintiffs' ability to present their case will be prejudiced absent this testimony. *See Beauty Enters.*, 2008 WL 3892203, at *2 (authorizing *de bene esse* deposition where moving party demonstrated need and prejudice because relevant information only became available after the close of discovery). By contrast, Defendants will suffer no prejudice from making these officials available for a short deposition, other than a brief interruption of their schedules. Indeed, were these witnesses within the Court's 100-mile jurisdiction, they would have to appear at trial notwithstanding their earlier deposition. Any burden is outweighed by Plaintiffs' need to present relevant testimony, and the Court's obligation to review the whole record of agency action.

Because these *de bene esse* depositions would be for the purpose of preserving and presenting trial testimony, they would not contravene Justice Ginsburg's administrative stay of this Court's July 3 order authorizing discovery. *See RLS Assocs., LLC v. United Bank of Kuwait, PLC*, No. 01 Civ. 1290 (CSH), 2005 WL 578917, at *6 (S.D.N.Y. Mar. 11, 2005) (“[T]he majority of courts considering this issue have made what can only be described as a federal common law distinction between ‘discovery depositions’ and ‘trial depositions’ (or alternatively, ‘preservation depositions’), and have held the latter category permissible even after the discovery deadline had passed.”); *Estenfelder v. Gates Corp.*, 199 F.R.D. 351, 352-56 (D. Colo. 2001) (collecting cases holding that “‘trial depositions’ are not discovery”).

transmission or through an officer authorized to administer oaths in Washington, D.C. *See Fed. Trade Comm'n v. Swedish Match N. Am., Inc.*, 197 F.R.D. 1, 2 (D.D.C. 2000).

Respectfully submitted,

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